88-519

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HO FAT SETO, etc.,

Petitioner,

vs.

ANN McLAUGHLIN, Secretary of Labor,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Fair Labor Standards Act be construed to allow recovery by the Secretary of Labor on account of non-testifying former employees as to whom there is no substantial evidence of overtime work?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner in this Court, and defendant-appellant in the proceedings below, is Ho Fat Seto, individually, and doing business as Ho Fat of California.

Respondent in this Court, and plaintiff-appellee in the proceedings below, is Ann McLaughlin, U.S. Secretary of Labor. Prior to her tenure, Secretaries of Labor Raymond J. Donovan and William E. Brock, III, were named plaintiffs.

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No. 88-_____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

HO FAT SETO, etc.,
Petitioner,
vs.
ANN McLAUGHLIN, Secretary of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner Ho Fat Seto prays that a Writ of Certiorari issue to review the judgment and opinion of United States Court of Appeals for the Ninth Circuit, per Tang, J., published in the official reports at 850 F.2d 586 (9th Cir. 1988). A copy of that opinion is reprinted as Appendix A hereto.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Sec. 1254. The Court of Appeals opinion was filed June 28, 1988.

STATUTORY PROVISIONS INVOLVED

Fair Labor Standards Act. 29 U.S.C. Sec. 216(c):

> . . . The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages.

STATEMENT OF THE CASE

Petitioner-defendant operates a clothing manufacturing business in Los Angeles, California. In 1984, the Secretary of Labor filed an action against him in the U.S. District Court for the Central District of California. (Appendix B). The action sought to enjoin FLSA violations and recover unpaid overtime. (Appendix B). The Secretary's complaint specified 28 employees of SETO as having been underpaid. (Appendix B-6).

The case proceeded to trial on August 12-15, 1986, before the Hon. Terry J. Hatter, Jr. The Secretary presented six witnesses; five former employees of defendant and the Department of Labor compliance officer. (RT 1-246). SETO presented five employee witnesses in rebuttal. (RT 247-376). Compliance officer Rolene Otero, during her testimony, explained how the testimony of five former employees was extrapolated to cover 28 claimants.

> Q. [By defendant's counsel]. Now, when you do a computation for a group of employees and you do not actually speak to each employee, do you still go ahead and make a computation for the employee that you do not speak to who you

think might have had a violation committed against them?

A. If the employee's statements indicate that, yes. In other words, if one employee tells me that, "I worked on a single needle machine and so did Joanne Smith and so did Donna," then I will — and they all worked on Saturday, then I will compute the same Saturday hours for all the employees in that area.

Q. And do you take into account that perhaps Joanne Smith might have only worked Tuesday, Wednesday, Thursday and Friday and did not work Monday that week?

A. If my information is that, yes.

Q. But if you do not speak to this Joanne Smith that you are using as an example, then isn't it true that you are basing your computation on what somebody else told you about this Joanne Smith; isn't that true?

A. That's true . . . . (RT 237:4-23).

Q. This is just a presumption on your part, but you don't have anything directly from that employee as to whether or not that employee worked 40 hours plus overtime or whether that employee worked a total of 22 hours for the whole week, including a Saturday. You really don't know other than this presumption that you have in your mind?

A. I don't have direct information. If I don't have direct information from that employee, you are correct. I am making

that presumption on the basis of other people's statements .... (RT 238:10-19).

Q. How many employees did you actually interview in this case face to face?

A. Approximately six. No. That's not true because then later on, after the complaint was filed, I interviewed probably ten more. So probably 16 altogether. (RT 240:19-25).

The District Court found for plaintiff, awarded judgment against SETO for $36,863.75 back wages plus $36,863.75 liquidated damages, a total of $73,727.50, and enjoined SETO from further violations. (Appendix C). Findings of fact and conclusions of law issued. (Appendix D). An exhibit to the judgment listed 28 individuals to whom the recovery was due. (Exhibit D-13).

In pertinent part, the findings and conclusions stated:

Finding of Fact No. 7

Plaintiff presented the testimony of five named employees during his case-in-chief. The testimony of these five employees was generally consistent and established a pattern of employment conditions applicable to all employees of defendant during the relevant period. The five testifying employees were representative of all employees employed by defendant during the relevant period. (Appendix D-2).

Conclusion of Law No. 8

Where an employer fails to maintain complete and accurate payroll records, plaintiff need only show that the employees performed work for which they were not paid the compensation required under the Act and the extent of such work "as a matter of just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.* 328 U.S. 680, 687, 66 S.Ct. 1187 (1946). This burden may be met by employee testimony. *Wirtz v. Dix Box Co.*, 322 F.2d 490 (9th Cir. 1963); *Marshall v. Van Matre*, 634 F.2d 1115, 1119 (8th Cir. 1980). Plaintiff has met his burden in this case by representative employee testimony establishing that employees worked more than 40 hours per week but were only paid at their regular piece-rate basis for all work performed. This pay practice violated the Act because the employees were not paid a premium rate for overtime hours worked and in some instances were not paid minimum wage for all hours worked. The amount of back wages due has been established as a matter of just and reasonable inference to equal the amounts set forth in the Appendix attached hereto. (Appendix D-8).

Conclusion of Law No. 9

Testimony or evidence of representative employees can establish prima

> facie proof of a pattern or practice of violations of the Act. Representative employee testimony established a pattern of violations .... (Appendix D-9).

The Court of Appeals affirmed. (Appendix A). The appellate court reviewed the "district court's application of the burden of proof in a claim for unpaid overtime under the FLSA ... [as] ... a question of law, reviewed de novo." (Appendix A-4). The court stated, in reliance on *Anderson v. Mt. Clemens Pottery Co., supra*, that "an employee carries his burden under the FLSA if he shows he performed work for which he was improperly compensated and produces some evidence to show the amount and extent of that work 'as a matter of just and reasonable inference.' " (*Ibid.*) The court then continued:

> We hold that the *Mt. Clemens Pottery* standard allows district courts to award back wages under the FLSA to non-testifying employees based upon the fairly representative testimony of other employees. (Appendix A-4).

Defendant SETO now seeks review of that holding by this Petition for Writ of Certiorari.

REASON FOR GRANTING THE WRIT

THE STANDARD OF PROOF REQUIRED OF THE SECRETARY OF LABOR IN FAIR LABOR STANDARDS ACT CASES IS SO ATTENUATED THAT THE ADJUDICATION OF OVERTIME PAY CLAIMS VIOLATES ACCEPTED PROCEDURAL NORMS AND IS UNFAIR TO EMPLOYER-DEFENDANTS.

One key purpose of the FLSA is to assure that workers will receive premium pay for overtime and weekend work. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 68 S.Ct. 1186 (1948). Thus, the Secretary of Labor is empowered by 29 U.S.C. Sec. 216 to bring an enforcement action on behalf of underpaid workers.

In the early years of FLSA, the Secretary often had great difficulty proving his (or her) affirmative case. *See generally Gerber & Galfand, Employees' Suits Under the Fair Labor Standards Act*, 95 U.Pa.L.Rev. 505, 526 (1947); *e.g., Mornford v. Andrews*, 151 F.2d 511 (5th Cir. 1945); *Block v. Bell*, 63 F.Supp. 863 (W.D.Ky. 1945), *aff'd*, 152 F 2d 964 (6th Cir. 1946); *see* Note, 43 Col.L.Rev. 355 (1943). Traditional common law standards of proof were difficult to meet. Employees generally did not keep record of hours worked and could only approximate. *Ibid.*

In response to the enforcement problem, this Court eased employees' burden of proof. *Anderson v. Mt. Clemens Pottery Co., supra.* The Court, per Murphy, J., said:

> An employee who brings suit . . . has the burden of proving that he performed work for which he was not properly compensated . . . . when the employer has kept proper and accurate records the

> employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation, *we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.* 328 U.S. at pp. 686-687, 66 S.Ct. at p. 1192 (emphasis added).

Based on *Mt. Clemens Pottery*, the federal trial and appellate courts proceeded to apply an extraordinarily liberal approach to FLSA burdens of proof. *See generally* Foster, *Jurisdiction, Rights, and Remedies for Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions*, 1975 Wis. Rev. 295, 307; *see Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (9th Cir. 1985); *Wirtz v. Dix Box Co., supra.* Defendant believes this trend has gone too far. As illustrated by the

instant case, FLSA plaintiffs are now being allowed to prevail on utterly flimsy evidence which would be laughed out of court in any other civil proceeding. Normal adjudication based on a preponderance of substantial evidence does not exist in this domain. Instead, the district courts have become rubber stamps for inflated government claims. For these reasons, defendant SETO asks that *Mt. Clemens Pottery* be re-examined.

Defendant particularly objects to the apparent rule that awards may be made on behalf of *non-testifying* employees. In the instant case, as the Court of Appeals noted, five witnesses testified they worked unpaid overtime. Yet the district court assessed compensatory and liquidated damages on behalf of 28 employees. This inference was held to be "just and reasonable" under *Mt. Clemens Pottery* because the Secretary represented, with consummate vagueness, that "all of the employees regularly worked" unpaid overtime. (Appendix A-2). *Compare, e.g., Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983) (13 out of 39 successful plaintiffs testified); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468 (11th Cir. 1982) (23 out of 207 successful plaintiffs testified); *Marshall v. Brunner*, 500 F. Supp. 116 (W.D.Pa. 1980) (48 out of 93 successful plaintiffs testified).

This existing approach goes far beyond what *Mt. Clemens Pottery* authorized. *Mt. Clemens Pottery* applied its looser, "just and reasonable inference" standard to the *amount of overtime work*. It did *not* apply that standard to the *fact of overtime work*. On the contrary, *Mt. Clemens Pottery* explicitly distinguished these two factual issues, a distinction the lower courts now regularly ignore.

> Nor is such a result to be condemned by the rule that precludes the recovery of

> uncertain and speculative damages. That rule applies only to situations where the *fact of damage* is itself uncertain. But here *we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute.* The damage is therefore *certain. The uncertainty lies only in the amount of damages* arising from the statutory violation by the employer .... It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages." 328 U.S. at p. 688, 66 S.Ct. at p. 1193 (emphases added).

In the instant case, for example, there was no reliable, admissible evidence of the *fact of damage*, *i.e.*, that any of the 23 non-testifying employees ever worked more than 40 hours in a week. The five testifying employees testified only that "all" employees worked overtime. Particularly in light of the variable nature of garment industry piece-work, such testimony is classically vague. The Secretary sent out questionnaires to SETO's employees, but most were returned as undeliverable. (RT 231:8-14). The compliance officer actually interviewed only 16 claimants. (RT 240:20-25). The Secretary's claim on behalf of the 23 non-testifying employees thus was simply insubstantial, bald hearsay. (RT 237:19-23, 238:16-19).

Notwithstanding the general tendency to interpret *Mt. Clemens Pottery* very broadly, some courts have acknowledged and respected its limitations. In *Gilbert v. Old Ben Cold Corp.*, 407 N.E. 2d 170 (Ill. App. 1980), an Illinois appellate court upheld a trial court finding that plaintiffs had not carried their burden of proving the

fact of overtime work. The court recognized that "an employee may satisfy his burden of proof, enabling the court *to determine approximate damages*, if he provides information 'such as the reasonable and creditable estimates of the *employees themselves*.' " 407 N.E. 2d at p. 175, quoting from *Brennan v. Parnham*, 366 F.Supp. 1014, 1025 (W.D.Pa. 1973) (emphases added). However, the court also said: "Mere estimates of hours of work performed, without more, are not, one may infer, sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference, as required by *Mt. Clemens*." 407 N.E. 2d at p. 175. *A fortiori*, in the instant case, since there are no estimates at all by 23 of the "employees themselves."

In *Marshall v. R & M Erectors, Inc.* 429 F.Supp. 771 (D.C.Del. 1977), the defendants acceded to liability re 11 employees who testified, but argued the Secretary failed to carry his burden of proof re 12 identified, non-testifying employees and 11 unidentified employees. The court agreed that the Secretary's claim on behalf of the unidentified employees was unacceptable speculation. But the court granted the Secretary judgment re the 12 identified, non-testifying employees. The court realized that "the proof . . . [was] not as powerful as might normally be expected. . . ." 429 F.Supp. at p. 778. Nonetheless, the court concluded: "The Secretary's inspection of records and interviews confirmed their salaries and terms of employment." (*Ibid*).

In the instant case, however, and in many other cases,[1] there are no records or interviews supporting the

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[1] The amount of enforcement activity is significant. Compliance officer Otero alone has handled about a thousand such cases. (RT 226:15-17). In fiscal year 1985, the Secretary undertook 66,943 FLSA investigations, collected $79.7 million due 268,100 workers for underpaid overtime, and collected $29.6 million due 166,700 workers for underpaid minimum wages. U.S. Department of Labor,

(continued)

fact of overtime work. The Secretary's records are summarized in the Explanation Of Computation attached to the district court's findings. (Appendix D-12). This purported "Explanation" is laced with assumptions. (Appendix D-12, 13, 14). Most importantly, the "Explanation" assumes each employee worked 40-50 hours per week. Of course, aside from vague testimony and the Secretary's representations, there is no evidence to support that assumption. Indeed, given the itinerant nature of garment industry piece-work, (as compared to the regimented union labor present in *Mt. Clemens Pottery*), the assumption is quite unlikely.

Nor do interviews support the fact of overtime work. Compliance officer Otero had *no* interviews with 12 claimants. (RT 237-239). The claims of at least these 12 non-interviewed, non-testifying employees, are based on pure speculation. Like the claims of the unidentified employees in *Marshall v. R & M Erectors*, their claims have not been proven by a preponderance of evidence.

Yet the Due Process clause requires "preponderance of the evidence" as a minimum standard of proof.[2] *See Santosky v. Kramer*, 455 U.S. 745, 754-755, 102 S.Ct. 1388, 1395-1396 (1982); *Addington v. Texas* 441 U.S. 418, 423-425, 99 S.Ct. 1804, 1808-1809 (1979); *see Calif. Evid. Code* Sec. 115. "The function of a standard of proof, as that concept is embodied in the Due Process clause and in the realm of factfinding, is to instruct the factfinder concerning the *degree of confidence* our

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(ftn. continued)
Minimum Wage and Maximum Hour Standards Under the FLSA, 1986 Annual Report to Congress.

[2] Defendant did not formally raise a Due Process objection in the proceedings below and does not seek to do so explicitly here. Nevertheless, consciousness of that constitutional boundary is important because *Mt. Clemens Pottery* must be construed not to encroach upon it.

society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas, supra*, 441 U.S. p. 423. (emphases added).

In FLSA cases, there can be no significant "degree of confidence" in the *fact of overtime work* when there is no substantial evidence the alleged overtime worker worked overtime. Stated another way, it is neither just, nor reasonable, nor constitutional, to allow a factfinder to infer that a particular worker worked overtime from the mere fact that the worker worked for SETO. *Cf. Commissioner of Internal Revenue v. Bain Peanut Co.*, 134 F.2d 853, 857 (5th Cir. 1943), *cert. dismissed*, 321 U.S. 800, 64 S.Ct. 633.

Prior to its 1974 Amendment, 29 U.S.C. Sec. 216(c) required that enforcement by the Secretary be initiated via a written request from an aggrieved employee. The elimination of this requirement gave the government enforcer freer rein. The instant case and its numerous cousins show the government's minions have even freer rein. Not only can the Secretary investigate without a complaint, she can also prevail without substantial evidence.

The tension between the statute's remedial purpose and principles of fair adjudication is well illustrated by *Brock v. Seto,*[3] 790 F.2d 1446 (9th Cir. 1986). In *Brock v. Seto*, the Secretary sought back pay for 16 employees based on the testimony of four employees. The district court, per Takasugi, J., found by a preponderance of evidence that there had been FLSA violations and so issued an injunction. At the same time, the district court disallowed the employees' back wage claims as "too speculative and unspecific." 790 F.2d at p. 1447. On

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[3] The defendant in *Brock v. Seto* is not Ho Fat Seto; it is Some Seto.

appeal, however, the Court of Appeals, per Wright, J., reversed, holding that Judge Takasugi had not followed *Mt. Clemens Pottery* correctly.

This defendant SETO disagrees. The 12 non-testifying employees in *Brock v. Seto*, under a proper reading of *Mt. Clemens Pottery*, did not prove the *fact of overtime work*. The district court approach, not the Court of Appeals approach, should be the law.

Re-evaluation of *Mt. Clemens Pottery*, in light of 40 years experience, would not necessitate a return to a rigid burden of proof in FLSA cases. Instead, a modernized approach could be tailored to accommodate the remedial purpose of the Act, universally accepted standards of proof and the substantial evidence rule. For example, there is no clear reason why claimants, in order to obtain recovery, should not be required to actually testify briefly in open court. If a claimant is identifiable and interested in receiving a monetary award, it would seem a modest requirement that he attend a trial. Indeed, since the statute *directs* the Secretary to pay each employee his share of the recovery, it seems ludicrous to allow any recovery for an employee whose whereabouts are unknown, *e.g.*, the ten "claimants" with whom the compliance officer had no contact and who made no claim.

At the minimum, the Secretary could be required to make some sort of substantive showing that each particular claimant actually worked overtime. This might be done by employee declarations instead of court testimony. It might even be done by unsworn questionnaires or other such data. But it should not be done by the vague "proof" increasingly seen in the reported cases.

CONCLUSION

For the reasons stated above, petitioner prays the Writ of Certiorari will be granted.

DATED: September 23, 1988

Respectfully submitted,

GERALD GOLDFARB
Counsel for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO 87-5515

Ann McLaughlin,* Secretary of Labor,
Plaintiff-Appellee,
v.
Ho Fat Seto, dba: Ho Fat of California,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

D.C. No. CV-83-7330-TJH

OPINION
FILED June 28, 1988

Before: Thomas Tang, Betty B. Fletcher and
Harry Pregerson, Circuit Judges.

TANG, Circuit Judge:

Ho Fat Seto (Seto) appeals the district court's award of back wages and liquidated damages under the Fair Labor Standards Act (FLSA), 29 U.S. C. §§ 201-219, to twenty-three non-testifying employees. Seto argues that the district court erred by determining a class-wide violation of the Act because the testifying employees were not "fairly representational" of the remaining employees. He contends that the testimony was incon-

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*Ann McLaughin is substituted for plaintiff William E. Brock, III, pursuant to Fed.R.App.P. 43(c)(1)

sistent and conflicted with the testimony of four rebuttal witnesses. We affirm.

I.

Seto owns and operates a garment factory in Los Angeles. He pays piece-rate wages to employees who sew or press garments. On weekdays, workers are regulated by a bell that rings to mark the beginning and end of the workday and work breaks.

This action was brought under sections 16(c) and 17 of the FLSA. The Secretary sought to enjoin Seto from violating the FLSA's minimum wage, overtime and recordkeeping provisions, from shipping in interstate commerce goods produced by individuals employed in violation of the FLSA, and from withholding back wages due to twenty-eight named employees. The Secretary also sought liquidated damages in an amount equal to the back wage award, and requested costs. Seto admitted FLSA coverage, but denied that any violation existed.

During her case-in-chief the Secretary presented the testimony of five named employees. Based upon the Secretary's representation that the testimony of the twenty-three remaining employees would be largely similar, and that all employees worked the same general hours and were paid on a piece-rate basis, the district court permitted only those five to testify on behalf of the Secretary. All of the Secretary's employee witnesses testified that they began working around 7:00 a.m. but were not permitted to punch the factory time clock until the morning bell rang at 7:30 a.m. They all testified that they worked nearly ever Saturday from 7:30 a.m. to 2:15 p.m., and that they did not punch a timecard for their Saturday work. Three of the employees stated that they worked past the quitting bell in the afternoon but that they punched out, or somebody else

punched out for them, as having ceased work when the quitting bell rang at 4:30 p.m. The Secretary's witnesses stated that the hours reflected on their paycheck stubs always underrepresented the hours they worked and that they were not paid for the hours they worked in excess of forty hours per week. Four testified that Seto misrepresented the hours actually worked in a given week to artificially comply with the minimum wage laws.

The Secretary's Compliance Officer testified that she calculated wages due by interviewing 16 employees. She stated that she figured back wages due to some employees based on interviews with co-workers, on comparisons of payroll records, check stubs, and time cards., and on Seto's representations. She adjusted the calculations by figuring time off when the factory was closed, when work was slow, or employees were ill.

Seto presented no case-in-chief, but offered four rebuttal witnesses. Three of the rebuttal witnesses were current piecework Seto employees; the fourth was Seto's job supervisor. The three current employees testified that they never worked before or after the starting or quitting bells or on Saturdays. On cross-examination, one of Seto's rebuttal witnesses, when confronted with a questionnaire signed with her name and stating she had worked thirty-five Saturdays, denied having signed the statement. Seto's job supervisor, Lydia Gutierrez, testified that the factory was open "very rarely" on Saturdays, and if employees did work on Saturdays, they punched a timecard. Ms. Gutierrez testified that when employees worked overtime they were paid overtime; she stated that if employees claimed they were not making the minimum wage, she would give them the minimum.

The district court found minimum wage, overtime, and recordkeeping violations. It ordered back wages in the amount requested by the Secretary, plus

post-judgment interest, and liquidated damages. The court also enjoined Seto from future wage and recordkeeping violations and from shipping in interstate commerce goods manufactured under practices violating the FLSA, and ordered costs and attorney's fees in favor of the Secretary.

II.

We review the district court's findings of fact for clear error. *Brock v. Seto*, 790 F.2d 1447 (9th Cir. 1986). The district court's application of the burden of proof in a claim for unpaid overtime under the FLSA is a question of law, reviewed de novo. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946); *Brock v. Seto*, 790 F.2d at 1447.

III.

Seto contends that the district court erred in awarding back wages to the non-testifying employees because the five witnesses presented by the Secretary failed to establish a pattern of FLSA violations. We disagree.

The district court found that Seto's payroll records were false and inaccurate. Seto does not dispute that finding in this appeal. Where an employer failed to maintain accurate payroll records an employee carries his burden under the FLSA if he shows he performed work for which he was improperly compensated and produces some evidence to show the amount and extent of that work "as a matter of just and reasonable inference." *Mt. Clemens Pottery*, 328 U.S. at 687; *Brock v. Seto*, 790 F.2d at 1448.

We hold that the *Mt. Clemens Pottery* standard allows district courts to award back wages under the FLSA to non-testifying employees based upon the fairly

representative testimony of other employees. *See Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985)(granting back wages under the FLSA to non-testifying employees based upon the representative testimony of a percentage of the employer's employees). The burden is not on the employees to prove the precise extent of uncompensated work. *Mt. Clemens Pottery*, 328 U.S. at 687. The testimony of the Secretary's five employee witnesses, while inconsistent in terms of exact days and hours of overtime worked, established "as a matter of just and reasonable inference," *id.*, that all of the employees regularly worked over eight hours on weekdays and over six hours on many Saturdays. All five of the Secretary's witnesses testified that they worked before the 7:30 a.m. bell on weekdays and that they worked Saturdays. Three witnesses stated that they worked beyond the 4:30 p.m. bell weekdays. The testimony directly supports the district court's findings that all Seto's employees regularly worked over forty hours per week. The twenty-three non-testifying employees established a prima facie case that they had worked unreported hours. *See Brock v. Seto*, 790 F.2d at 1449; *Wirtz v. Dix Box Co.*, 322 F.2d 499, 501 (9th Cir. 1963).

Once the employees establish a prima facie case, the burden shifts to the employer to come forward with evidence of the precise amount of work performed or evidence to negate the reasonableness of the inference to be drawn from the employees' evidence. *Mt. Clemens Pottery*, 328 U.S. at 687-88. Seto presented four rebuttal witnesses, each of whom testified that working hours were from 7:30 a.m. to 4:30 p.m., Monday through Friday. All of the rebuttal witnesses were current Seto employees. Seto argues that their testimony negated the inference that all employees were similarly situated. We disagree. The district court determined that the four witnesses were not credible. We accord great deference to the trial court's opportu-

nity to assess the credibility of witnesses. Fed. R. Civ. P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). The district court's credibility determination is not clearly erroneous. The testimony of Seto's four rebuttal witnesses fails to negate the reasonable inferences drawn from the employees' evidence.

Where an employer fails to meet its burden, the district court "may then award damages to the employee, even though the result may be only approximate." *Mt. Clemens Pottery*, 328 U.S. at 688. Under that standard, the district court's damages awards were proper. The court considered the inconsistencies in the testimony of the Secretary's witnesses when it formulated the awards. The damages are based on reasonable inferences drawn from the employees' testimony. See *Brock v. Seto*, 790 F.2d at 1449 (remanding the Secretary's claim for back wages to permit the district court to approximate an award based on reasonable inferences from employees' testimony).

CONCLUSION

The district court properly concluded that the five witnesses presented by the Secretary fairly represented the entire class of employees. Seto failed to carry his burden of establishing the precise amount of work performed by the employees or negating the reasonable inferences drawn from the employees' evidence *Mt. Clemens Pottery*, 328 U.S. 687-88. The district court's damages award was properly based upon reasonable inferences from the employees' testimony. *Brock v. Seto*, 790 F.2d at 1448-49.

AFFIRMED

APPENDIX B

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Attorneys for Plaintiff

LODGED
JUNE 1, 1984
Clerk U.S. District Court
Central District of California

**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT
OF CALIFORNIA**

RAYMOND J. DONOVAN,
SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR,

Plaintiff,

v.

HO FAT SETO, Individually and Doing Business as
HO FAT OF CALIFORNIA

Defendant.

CIVIL ACTION FILE
NO. 83-7330-TJH (JRx)
FIRST AMENDED COMPLAINT TO
ENJOIN FAIR LABOR STANDARDS ACT
VIOLATIONS and RECOVER AMOUNTS DUE

1) Plaintiff, Secretary of Labor, United States Department of Labor, brings this action to enjoin and restrain defendant from violating the provisions of Sections 15 (a)(1), 15 (a)(2) and 15(a)(5) of the Fair

Labor Standards Act, as amended (29 U.S.C. 201, *et seq.*), hereinafter called the Act, pursuant to Section 17 of the Act, and to recover amounts owing under the Act to present and former employees together with an additional equal amount as liquidated damages, pursuant to Section 16(c) of the Act.

2) Jurisdiction of this action is conferred upon this Court by Sections 16(c) and 17 of the Act.

3)(a) Defendant Ho Fat Seto resides within the jurisdiction of this Court.

(a)(i) Defendant Ho Fa Seto is and at all times material hereto has been doing business as Hot Fat of California with a place of business at 1228 So. S. San Pedro Street, Los Angeles, California 90015, and he is and at all times material hereto has been engaged in garment manufacturing.

4) The defendant is and at all times material hereto have (*sic*) been employing employees in and about the aforesaid place of business in producing, handling, or working on goods a substantial portion of which has been and is being shipped, delivered, or sold to places outside the State of California or has been and is being delivered or sold with knowledge or reason to believe that shipment, delivery, or sale to places outside of said State is intended. Said employees, by reason of their employment as aforesaid, are and were engaged in commerce or in the production of goods for commerce within the meaning of the Act.

5) The business activities of the defendant constitute, and at all times material hereto have constituted, related activities performed through unified operations or common control for a common business purpose: and they are, and at all times material hereto have been, an "enterprise" as defined in section 3(r) of the Act.

6) Said enterprise has, and at all times material hereto has had, employees engaged in commerce or in

the production of goods for commerce or in handling, selling or otherwise working on goods or materials which have been moved in or produced for commerce and has, and at all times material hereto has had, an annual gross volume of sales made or business done (exclusive of any excise taxes at the retail level which were separately stated) of not less than $250,000; and said enterprise constitutes, and at all times material hereto has constituted, an "enterprise engaged in commerce or in the production of goods for commerce" as defined in Section 3(s) of the Act.

7) The defendant has violated and is violating the provisions of Sections 6 and 15(a)(2) of the Act by employing employees engaged in commerce or in the production of goods for commerce, within the meaning of the Act, or employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of Section 3(s) of the Act as aforesaid, at wage rates less than $3.10 and (*sic*) hour since January 1, 1980, and less than $3.35 an hour since January 1, 1981.

8) The defendant has violated and is violating the provisions of Sections 7 and 15(a)(2) of the Act by employing employees engaged in commerce or in the production of goods for commerce, within the meaning of the Act, or employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of Section 3(s) of the Act as aforesaid, for workweeks longer than 40 hours without compensating said employees for their employment in excess of 40 hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed.

9) The defendant has violated and is violating the provisions of Section 15(a)(1) of the Act by transporting, offering for transportation, shipping, delivering, or selling in commerce, or by shipping, delivering or

selling with knowledge that shipment or delivery or sale in commerce was intended, goods in the production of which employees were employed in violation of Sections 6 and 7 of the Act.

10) The defendant has violated and is violating the provisions of Sections 11(c) and 15(a)(5) of the Act by failing to make, keep, and preserve records of employees and of the wages, hours, and other conditions and practices of employment maintained, as prescribed by the regulations duly promulgated pursuant to the authority granted in the Act and published in the Federal Register and known as 29 C.F.R. 516.

11)(a) During the period since November 1, 1980, defendant has violated and is violating the provisions of the Act.

(b) A judgment which permanently enjoins and restrains such violations is specifically authorized by Section 17 of the Act.

(c) A Judgment which grants recovery of unpaid minimum wage and overtime compensation, plus an additional equal amount as liquidated damages is specifically authorized by Section 16(c) of the Act.

WHEREFORE, cause having been shown, plaintiff prays for judgment, pursuant to Section 17 of the Act, permanently enjoining and restraining defendant, his officers, agents, servants, employees and those persons in active concert or participation with them, from violating the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Act and further prays for judgment, pursuant to Section 16(c) of the Act, against the defendants and in favor for plaintiff, for amounts of such backwages (*sic*) which are found by the Court to be due to (*sic*) the present and former employees named on the Attached Exhibit A (and for any person added there to at a subsequent date) and for an additional equal amount as liquidated damages.

Plaintiff further prays that he recover his costs of this action.

FRANCIS X. LILLY
Solicitor of Labor

DANIEL W. TEEHAN
Regional Solicitor

JOHN C. NANGLE
Associate Regional Solicitor

HERBERT JAY KLEIN
Attorney

Attorneys for Plaintiff
U.S. DEPARTMENT OF
LABOR

Exhibit A

Name

Selfia Arranaga
Catalina Calderon
C. Cauich
Dulce Chavez
Bertha Estrada
Rosalina Fernandez
Jose Figueroa
Irene Flores
Angelica Lopez
Guadalupe Madrigal
Sergio Margalon
Demy Montono
Jose Diaz Moreno
Luis Moreno
Flora Naedy Navarro
Pascual Negreros
Mary Ngoon
Concepcion Perez
Griselda Pineda
Jose Garcia
Maria C. Rivera
Clemente Robles
Maria Rodriguez
Jose Rojas
Arturo Ruiz
Wendy Tsao
Arnalia Vasquez
Luis Ruiz

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM E. BROCK, III, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, (Successor to Donovan, Resigned)

Plaintiff

v.

HO FAT SETO, Individually and Doing Business as HO FAT OF CALIFORNIA,

Defendant.

CV 83-7330-TJH (JRx)

AMENDED JUDGMENT

This action came on for trial before the Court, Honorable Terry J. Hatter, Jr., District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED

that the defendant, his officers, agents, servants, employees and those persons in active concert or participation with them, who receive actual notice of this order by personal service or otherwise be, and they hereby are, permanently enjoined and restrained from violating the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C.A. 201, *et seq.*), hereinafter called the Act, in any of the following manners:

1) The defendant shall not contrary to Section 6 of the Act, pay any employee who in any workweek is engaged in commerce or in the production of goods for commerce, within the meaning of the Act, or employed

in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of Section 3(s) of the Act, wages at a rate less than $3.35 per hour (or at a rate less than such other applicable minimum rate as may hereafter be established by amendment to the Act).

2) The defendant shall not, contrary to Section 7 of the Act, employ any employee, who in any workweek is engaged in commerce or in the production of goods for commerce within the meaning of the Act, or employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of Section 3(s) of the Act, for any workweek longer than forty (40) hours unless such employee receives compensation for his or her employment in excess of forty (40) hours in such workweek at a rate not less than one and one-half times the regular rate at which he or she is employed.

3) The defendant shall not contrary to Section 15(a)(1) of the Act, transport, offer for transportation, ship, deliver, or sell in commerce or ship, deliver, or sell with knowledge or reason to believe that shipment, delivery, or sale in commerce in intended, goods in the production of which employees were employed in violation of Sections 6 and/or 7 of the Act.

4) The defendant shall not fail to make, keep and preserve records of employees and of the wages, hours and other conditions and practices of employment maintained, as prescribed by the regulations issued, and from time to time amended, pursuant to Section 11(c) of the Act and found in 29 Code Federal Regulations 516; and it was further

ORDERED AND ADJUDGED that the plaintiff shall have and recover from the defendant $36,863.75 in unpaid minimum wage and overtime compensation and $36,863.75 in liquidated damages hereby found to be due under the Act to 29 employees for the period

from November 1, 1980, to June 25, 1984, as a result of their employment by said defendant, as set forth in the exhibit which is attached hereto, marked "Exhibit A," and made a part hereof, showing the name of each of the employees and listing opposite thereto the gross amount of back wages and liquidated damages due to the employee; and it is further

ORDERED that, pursuant to the provisions of the preceding paragraph hereof, the defendant shall not fail to deliver to the plaintiff's authorized representatives at U.S. Department of Labor (ESA), Wage and Hour Division, P.O. Box 3646, Dallas, Texas 75285 (or such other place as may hereafter be designated in writing by the plaintiff), the following:

a. The employer identification number(s) of the defendant and a schedule in duplicate showing the name, last known address, and social security number for each of the persons named in Exhibit A attached hereto.
b. A certified or cashier's check or money order (with the *firm* name and civil action file number (from the caption on page one hereof) written on each) (*sic*) payable to the order of the "Wage & Hour Division U.S. Department of Labor," in an amount not less than $73,727.50 (plus post-Judgment interest, on the balance outstanding from time to time, at the rate prescribed by 28 U.S.C. 1961), from the date of this Judgment until paid in full).

The plaintiff shall distribute the remittance(s), or the proceeds thereof, to the persons named in Exhibit A attached hereto, or their estates if that be necessary, and any money not so paid, because of inability to locate the proper persons or because of their refusal to accept it, shall be deposited by the plaintiff in a special deposit account for payment to the proper persons and upon such inability to so pay within three years shall be

deposited into the United States Treasury as miscellaneous receipts, pursuant to 29 U.S.C. 216(c); and it is further

ORDERED that the filing, pursuit, and/or settlement of this action shall not act as or be asserted as a bar to any action under Section 16 of the Act as to any employee not named on the attached Exhibit A or any employee named on said Exhibit for any period of employment not covered therein; and it is further

ORDERED that plaintiff shall recover of defendant $1,425.00 in expenses (including attorney's fees and costs) incurred by plaintiff in proving the truth of matters which defendant failed to admit in response to requests for admission; and it is further

ORDERED that plaintiff shall recover of defendant the costs of distribution of the back wages and liquidated damages to the employees entitled thereto on plaintiff's application subsequent to said distribution.

Dated: _____, 19__

TERRY J. HATTER, JR.
UNITED STATES
DISTRICT JUDGE

Re: Brock v. Ho Fat Seto, etc.
USDC, Central Dist. of Calif., File No. 83-7330
TJH (JRx)

APPENDIX D

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Telephone: (213) 894-4983
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM E. BROCK, III, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Plaintiff,

v.

HO FAT SETO, Individualy (*sic*) and Doing Business as HO FAT OF CALIFORNIA
Defendant

CIVIL ACTION FILE NO.
83-7330-TJH (JrX)

PLAINTIFF'S SECOND AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Court pursuant to a complaint filed by the Secretary of Labor, United States Department of Labor, in the above named and numbered cause. Having considered the pleadings, the pre-trial order, the evidentiary record and the argument of counsel, the Court, pursuant to Rule 52 of the Federal Rules of Civil Procedure, makes and issues its findings of fact and conclusions of law.

FINDINGS OF FACT

1) This is an action filed on November 10,1 983, under Sections 16(c) and 17 of the Fair Labor Standards Act of 1938 as amended, 29 U.S.C. § 201, *et seq.*, hereinafter called the Act. Plaintiff seeks to enjoin and restrain defendant from violating the minimum wage overtime, shipping, and recordkeeping provisions of the Act and to recover amounts owing to present and former employees of defendant, together with an equal additional amount as liquidated damages.

2) Plaintiff is the duly authorized Secretary of Labor, United States Department of Labor. Defendant is Ho Fat Seto, individually and doing business as Ho Fat of California.

3) Plaintiff's complaint alleged that defendant violated the Act at all times since November 1, 1980.

4) Defendant did not assert the affirmative defenses of the Statute of Limitations, or any other affirmative defense in his answer to the complaint.

5) The pre-trial order was filed herein on June 25, 1984, in which it was stipulated that defendant was subject to the Act at all times material hereto.

6) Therefore, the period covered by plaintiff's complaint is from November 1, 1980, as alleged in the complaint, till June 25, 1984, when the pre-trial order controlling this action was filed.

7) Plaintiff presented the testimony of five named employees during his case-in-chief. The testimony of these five employees was generally consistent and established a pattern of employment conditions applicable to all employees of defendant during the relevant period. The five testifying employees were representative of all employees employed by defendant during the relevant period.

Plaintiff could have called many more employee witnesses who would have testified substantially the same as the five employees who did testify for plaintiff; however, further testimony would have been cumulative because it was clear all employees generally worked the same hours and were paid strictly on a piece-rate basis.

8) The testimony of the five employees who testified on plaintiff's case-in-chief was credible.

9) Defendant did not call any witnesses in support of his case-in-chief.

10) Plaintiff produced four rebuttal witnesses, who generally contradicted plaintiff's witnesses. All of defendant's rebuttal witnesses were current employees of defendant. The testimony of defendant's rebuttal witnesses was not credible.

11) At all times material hereto, defendant has maintained a place of business at 1228 So. San Pedro Street, Los Angeles, California, within the jurisdiction of this Court, where defendant has carried on business as a garment manufacturer under the name of Ho Fat of California.

12) At all times material hereto, defendant employed employees in the production of goods for commerce, a substantial portion of which defendant shipped to places outside the state of California.

13) Defendant Ho Fat Seto is and at all times material hereto was responsible for the employment practices of Ho Fat of California.

14) At all times material hereto, defendant's business operations constituted an enterprise which has employees engaged in commerce or in the production of goods for commerce and which has had an annual dollar valume of not less than $250,000, exclusive of excise taxes.

15) Defendant employed each of the persons named in the Amended Complaint in defendant's garment business after November 1, 1980.

16) Defendant paid each person employed in his garment business at a piece-rate basis, other than managerial employees.

17) Defendant's payroll records indicate that since November 1, 1980, none of the employees named in the Amended Complaint worked more than forty hours per week for defendant, except during the three week period immediately preceding November 6, 1983.

18) Defendant's payroll records indicate that since November 1, 1980, defendant's employees generally worked Monday through Friday from 7:45 a.m. to 4:30 p.m. daily.

19) Defendant's payroll records indicate that since November 1, 1980, no employee worked more than forty hours per week or received overtime compensation, except during the three week period immediately preceding November 6, 1983.

20) Defendant's payroll records do not indicate that defendant's employees worked on Saturdays.

21) Defendant's payroll records are false and inaccurate.

22) It was defendant's regular business practice to remove employee time cards from the workplace on Friday and not to replace them until Monday.

23) Defendant's employees regularly worked on Saturday but were prevented by defendant from recording their hours worked on Saturday by punching a time card or otherwise.

24) Defendant's employees regularly worked more than forty hours per week but were prevented by defendant from recording the total number of hours worked by punching a time card or otherwise.

25) Defendant's payroll records falsely record the relevant data concerning the number of hours worked by defendant's employees and the regular hourly rate at which they were paid.

26) The employees' regular hourly rates for purposes of computing overtime compensation are calculated by dividing the total earnings in any given week by the total number of hours worked in that workweek.

27) Plaintiff's witnesses established that defendant's employees regularly worked over 40 hours per week.

28) The employees were generally allowed to punch in their time cards at 7:30 A.M. and punch out their time cards at 4:30 P.M., each day, Monday through Friday.

29) However, defendant's employees actually worked before 7:30 A.M. and after 4:30 P.M., Monday through Friday, on a regular basis.

30) Employees received a one-half hour lunch break and two fifteen minute rest breaks each day, Monday through Friday. Therefore, even according to defendant's contention that employees worked from 7:30 A.M. to 4:30 P.M. each weekday, with one-half hour for lunch and two fifteen minute rest breaks, employees performed 8.5 hours of compensable work per day, each day Monday through Friday.

31) Employees regularly worked on Saturdays for four to six hours per Saturday.

32) The defendant failed to pay all employees named in the Complaint not less than one and one-half their regular rates for all hours worked over forty per workweek.

33) Defendant's practice of paying piece-rate for all work performed resulted in employees being paid less than $3.35 per hour for all hours worked.

34) The volume of defendant's business fluctuated throughout the year during the period covered by the

complaint, causing defendant's employees to work more hours during some months than others. Defendant's slowest business periods were the three months beginning in December, each year.

35) Defendant's employees were required to stay at their work stations during slow times to wait for pieceworker to be assigned.

36) Even during slow weeks, defendant's employees worked at least forty hours per week.

37) Taking into account business fluctuations, I find defendant's employees generally worked 40 hours per week for three months of the year; 42 1/2 hours per week for 3 months of the year; 46 hours per week for 3 months of the year; and 50 hours per week for 3 months of the year.

38) Having considered the pleadings, the documentary evidence, and the testimony adduced at trial, I find that the computations of the amounts due set out in the Appendix attached hereto are reasonable and correct. Column A of the Appendix lists the names of the employees due back wages; column B of the Appendix lists the periods for which back wages are due each employee; and column C lists the total gross amount of minimum wages and overtime compensation due the employees.

CONCLUSIONS OF LAW

1) The Court has jurisdiction over the parties and the subject matter of this cause, 29 U.S.C. § 216(c) and 217 and 28 U.S.C. 1345.

2) Defendant is, and at all times material hereto was, an employer within the meaning of the Act and as an employer employed persons who were engaged in commerce or in the production of goods for commerce within the meaning of the Act.

3) Defendant's business activities are, and at all times material hereto were, an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of Section 3(s) of the Act. (29 U.S.C. 203(s)).

4) Defendant violated Sections 11(c) and 15(a)(5) of the Act by making and maintaining false time cards that inaccurately recorded the number of hours worked by his employees.

5) Defendant violated Sections 11(c) and 15(a)(5) of the Act by falsifying payroll records so as to misrepresent the employees' regular hourly rates of pay, total hours worked each workweek, total weekly straighttime earnings and total overtime excess compensation. *See* 20 C.F.R. §516.

6) Defendant violated the provisions of Sections 6 and 15(a)(2) of the Act by failing to pay employees at least $3.35 per hour for all hours worked. Defendant is liable for unpaid minimum wages due each employee not paid at least $3.35 per hour for all hours worked.

7) Defendant violated the provisions of Sections 7 and 15(a)(2) of the Act by failing to pay employees compensation at not less than one and one-half times their regular hourly rates for all hours worked in excess of forty per week. Defendant is liable for overtime compensation due each employee not paid at least one and one-half times his or her regular hourly rate.

8) Where an employer fails to maintain complete and accurate payroll records, plaintiff need only show that the employees performed work for which they were not paid the compensation required under the Act and the extent of such work "as a matter of just and reasonable inference". *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). This burden may be met by employee testimony. *Wirtz v. Dix Box*, 322 F.2d 499 (9th Cir. 1963); *Marshall v. Van Matre*, 634 F.2d 1115, 1119 (8th Cir. 1980). Plaintiff has met his burden in this

case by representative employee testimony establishing that employees worked more than forty hours per week but were only paid at their regular piece-rate basis for all work performed. This pay practice violated the Act because the employees were not paid a premium rate for overtime hours worked and in some instances were not paid minimum wage for all hours worked. The amount of back wages due has been established as a matter of just and reasonable inference to equal the amounts set forth in the Appendix attached hereto.

9) Testimony or evidence of representative employees can establish prima facie proof of a pattern or practice of violations of the Act. *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982). Once a pattern or practice is established the burden shifts to the employer to rebut the existence of the violations or prove that individual employees are excepted from the pattern of practice. *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973). Representative employee testimony established a pattern of violations in that all of defendant's employees regularly worked more than forty hours per week but were not compensated at not less than one and one-half times their regular hourly rates for all hours worked in excess of forty per week. Defendant has presented no credible evidence to the contrary.

10) The time spent by employee waiting for work to be assigned is compensable under the Act.

11) The two daily fifteen (*sic*) rest breaks taken by defendant's employees was (*sic*) compensable work time under the Act.

12) Defendant has not raised the affirmative defense of the statute of limitations and has thereby waived his right to claim that any unpaid back wages proved by the plaintiff are barred by any statute of limitation which

might otherwise be applicable. *Martin v. United States*, (C.D. Cal. 1977) 436 F. Supp. 535.

13) Section 16(c) of the Act provides that an employer who has violated the Act is liable not only for the amount of unpaid back wages found due, but is also liable for an additional equal amount as liquidated damages, — unless the *employer* pleads and proves that the violations were committed in good faith and that the employer had good reason to believe that his actions were not a violation of the Act.

14) Defendant has not raised this defense and has thereby waived any defense he might have otherwise had to the award of liquidated damages. Moreover, defendant's conduct demonstrates that he would not in any event qualify for the defense in that defendant falsified payroll records and violated the minimum wage and overtime provisions of the Act after being put on notice by the United States Department of Labor that he was subject to the provisions of the Act.

15) Defendant is liable for liquidated damages equal in amount, and in addition to the back wages found due to the employees named in the Amended Complaint, pursuant to Section 16(c) of the Act. Under the provisions of 29 U.S.C. § 260, the Court in the exercise of its sound discretion may refuse to award the full amount of the liquidated damages, where the employer pleads and proves that he acted in good faith and with reasonable grounds for believing that he as not violating the Act. *Kelly v. Holland*, 298 F.Supp. 1301 1309 (S.D. Cal. 1969). Defendant has not pled or proved this defense; therefore, liquidated damages equal to equal [sic] and in addition to the total gross unpaid back wages listed in the Appendix attached hereto must be awarded.

16) Plaintiff is entitled to an injunction restraining defendant from further violations of the minimum wage provisions of Sections 6 and 15(a)(2); the overtime

compensation provisions of Sections 7 and 15(a)(2) of the Act; the recordkeeping provisions of Sections 11(c) and 15(a)(5) of the Act; and the shipping provisions of Section 15(a)(1) of the Act. *Marshall v. Chala Enterprises, Inc.*, 645 F.2d 799, 803 (9th Cir. 1981).

17) Plaintiff is entitled to have included in the back wage payment order a provision requiring payment to plaintiff for distribution of the checks, or the proceeds thereof, to the employees concerned, or to their estates if that be necessary, and requiring that any money not so paid, because of inability to locate the proper person or because of their refusal to accept it, shall be deposited by the plaintiff in a special deposit account for payment to the proper persons and upon such inability to so pay within three years shall be deposited into the Treasury of the United States as miscellaneous receipts, pursuant to 29 U.S.C. 216(c).

18) Claims for unpaid compensation by employees not named in the amended complaint, or claims by named employees for back wages arising after June 25 1984, are not barred by this action.

19) Plaintiff is entitled to his costs of suit and a reasonable attorney's fee.

Dated: _____, 1986

_____
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ Leroy Smith
LEROY SMITH
Attorney for Plaintiff
U.S. Department of Labor

APPENDIX

A) NAME	(B) PERIOD COVERED	(C) GROSS AMOUNTS OF BACK WAGES DUE
Arranga, Selfia	11/1/80 - 6/25/84	$ 2,747.00
Calderon, Catalina	7/2/83 - 4/25/84	737.00
Cavich, C.	11/1/80 - 12/15/82	912.50
Chavez, Dulce	3/9/83 - 6/25/84	1,792.50
Estrada, Bertha	12/8/82 - 10/12/83	465.75
Fernandez, Rosalina	2/23/83 - 6/25/84	1,292.50
Figueroa, Jose	7/20/83 - 11/30/83	960.75
Flores, Irene	10/12/83 - 11/30/83	257.75
Garcia, Juan	8/1/83 - 8/31/83	115.75
Lopez, Angelica	5/6/81 - 12/30/81	553.75
Madrigal, Guadelupe	11/1/80 - 6/25/84	1,617.00
Margalon, Sergio	1/5/83 - 5/11/83	232.75
Montano, Delmy	3/11/81 - 6/25/84	4,993.00
Moreno, Jose Diaz	3/4/81 - 12/30/81	403.00
Moreno, Luis	6 months in 1981	132.50
Navarro, Flora	4/1/81 - 7/20/83	4,975.00
Negregros, Pascual	9/15/81 - 10/3/82	1,254.50
Ngoon, Mary	3/4/81 - 1/11/84	1,479.25
Perez, Concepcion	1/82 - 11/83	2,323.75
Pineda, Griselda	12-24/80 - 6/25/84	1,485.50
Rivera, Maria C.	4/8/81 - 5/26/83	2,390.00
Robles, Clemente	11/1/80 - 3/16/83	895.50
Rodriquez, Maria E.	11/2/83 - 6/6/84	878.00
Rojas, Jose	6/9/82 - 11/3/83	181.00
Ruiz, Arturo	6/23/82 - 2/8/84	821.50
Ruiz, Luis	8/2/83 - 8/24/83	1,277.75
Tsao, Wendy	3/30/83 - 11/9/83	1,351.75
Vasquez, Amalia	3/9/80 - 5/11/83	333.75
	TOTAL:	$ 36,863.75

EXPLANATION OF COMPUTATIONS

For each employee named in the amended complaint, Plaintiff transcribed the weeks worked and gross wages paid from the defendant's payroll records (Ex. 1a-d) onto the wage transcription sheets attached hereto. For four employees who either did not appear in defendant's payroll records (or in the case of Perez) only appeared for one week, Plaintiff based the computations on the admissions of defendant (filed herein) regarding the periods worked for these four employees. The four employees are Perez, Garcia, Negregros, and Luis Ruiz.

Plaintiff then totalled the gross pay for each year (or part thereof) for each employee. For example, Arranga was paid $4,952.50 in the year 1981. To find the minimum wages due for the employee in any period, the Plaintiff multiplied $3.35 (minimum wage) by the assumed number of hours worked per week (40, 42.5, 46 or 50 hours) to determine minimum weekly wages due. Plaintiff then multiplied the minimum weekly wage by the number of weeks worked by the employee in the given year or part thereof, to determine the minimum yearly wage due the employee. To the extent the minimum yearly wage was higher than the wages actually paid the employee, minimum wages are due For example, for Arranga in 1981: she worked 37 weeks; 37 weeks at 40 hours per week paid at minimum wage equals $5,701.70. Since Arranga was paid only $4,952.50 in 1981, she is due $749.20 in minimum wages for 1981 if she worked 40 hours per week. Naturally, she is due more if 42.5, 46 or 50 hours per week is used.

Plaintiff calculated overtime due by multiplying one-half of the employees regular hourly wage (but never less than one-half of $3.35) by the number of overtime hours worked per week, then multiplied by the number of weeks worked in that year or other period.

For purposes of computation, Plaintiff assumed that employees worked weeks not shown on the payroll records

if three or less consecutive weeks were blank, followed by weeks recorded. Plaintiff based this assumption on employee testimony that emplyees (*sic*) were sometimes paid for two or three weeks work with one paycheck.

Plaintiff's computations of amounts due are set forth in the attached computations. The computations are first in order for each employee, followed by the transcription sheets taken from defendant's payroll records (where employee work was recorded).

The gross amounts due set forth in Appendix A of Plaintiff's proposed findings were based on the assumption that employees worked 25% of the time at 40 hours per week; 25% of the time at 42.5 hours per week; 25% of the time at 46 hours per week; and 25% of the time at 50 hours per week. The amounts were actually derived by totalling the amounts due under all four alternative hour assumptions (40, 42.5, 46 or 50) and dividing by four.

For convenience of the Court, following is a chart of the computations contained in the wage transcription and computation sheets under each hours worked assumption (minus cents):

NAME	40 hrs.	42.5 hrs	46 hrs	50 hrs
Arranga	$ 5.50	$ 1,327	$ 3,338	$ 6,318
Calderon	0	346	899	1,703
Cavich	0	552	1,224	1,877
Chavez	793	1,442	2,652	4,039
Estrada	0	279	625	959
Fernandez	0	485	1,639	3,046
Figueroa	220	634	1,190	1,799
Flores	72	172	313	474
Garcia	0	62	150	251
Lopez	0	259	717	1,239
Madrigal	0	857	1,900	3,711
Margalon	0	88	170	671
Montano	1,694	3,476	5,975	8,830

NAME	40 hrs.	42.5 hrs	46 hrs	50 hrs
J. Moreno	0	154	523	947
L. Moreno	0	80	178	272
Navarro	2,396	3,789	5,743	7,974
Negregros	0	677	1,628	2,713
Ngoon	0	738	1,826	3,353
Perez	0	1,255	3,015	5,025
Pineda	0	849	2,010	3,083
Rivera	175	1,174	3,040	5,171
Robles	0	541	1,200	1,841
Rodriquez	669	82	940	1,121
Rojas	0	109	243	372
A. Ruiz	0	496	1,101	1,689
L. Ruiz	0	690	1,658	2,763
Tsao	585	999	1,580	2,243
Vasquez	148	248	389	550
	$6,757	$22,530	$45,866	$74,034

FILED
DEC 28 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. 88-519

In the Supreme Court of the United States

OCTOBER TERM, 1988

HO FAT SETO DBA HO FAT OF CALIFORNIA, PETITIONER

v.

ANN MCLAUGHLIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly awarded back wages under the Fair Labor Standards Act, 29 U.S.C. (& Supp. IV) 201 *et seq.*, to nontestifying employees based on the representative testimony of other employees concerning hours worked.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-519

HO FAT SETO DBA HO FAT OF CALIFORNIA, PETITIONER

v.

ANN MCLAUGHLIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 850 F.2d 586. The findings of fact and conclusions of law of the district court (Pet. App. D1-D14) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1988. The petition for a writ of certiorari was filed on September 26, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Ho Fat Seto owns and operates a garment factory in Los Angeles, paying piece-rate wages to all

nonmanagerial employees (Pet. App. A2, D3, D4). Respondent Secretary of Labor brought this action under the Fair Labor Standards Act (FLSA or Act), 29 U.S.C. (& Supp. IV) 201 *et seq.*, alleging, among other things, that petitioner had failed to keep required records and to pay his employees minimum wage and overtime for all hours worked (Pet. App. B1-B6). The Secretary sought to enjoin petitioner from future FLSA violations and to obtain back wages and an equal amount of liquidated damages for 28 named employees (*id.* at A2, B1-B6).

At trial, the five employee witnesses presented by the Secretary all testified that they began work about 7 a.m. on weekdays but were not permitted to punch the factory time clock until the starting bell rang at 7:30 a.m. (Pet. App. A2, D5). Three of the employees testified that they also worked after punching out when the quitting bell rang at 4:30 p.m. (*id.* at A2-A3, A5, D5). Employees received a half-hour lunch break and two 15-minute rest breaks each weekday (*id.* at D5). The Secretary's witnesses consistently testified that they worked nearly every Saturday from 7:30 a.m. to 2:15 p.m., but were not allowed to record their Saturday hours (*id.* at A2, D4). They further stated that the hours reflected on their pay stubs always underrepresented the hours they worked, and that they were not paid for hours they worked in excess of 40 hours per week (*id.* at A3). The Secretary had available many more employee witnesses who would have given substantially the same testimony, but the district court permitted only five to testify on the ground that further testimony would have been cumulative (*id.* at D3). In addition to the employee witnesses, the Secretary's compliance officer testified that she had calculated wages due after interviewing 16 employees and reviewing petitioner's payroll records, and adjusting for business fluctuations (*id.* at A3, D11-D14).

Petitioner's payroll records, with one minor exception, indicated that no employee ever worked on Saturday, worked more than 40 hours a week, or received any overtime compensation during the period covered by the complaint (Pet. App. D4). Petitioner presented four rebuttal witnesses who testified that they never worked before the starting bell, after the quitting bell, or on Saturdays (*id.* at A3, D3).

2. The district court credited the testimony of the Secretary's witnesses, finding that it was "generally consistent and established a pattern of employment conditions applicable to all employees" of petitioner (Pet. App. D2, D3). The court specifically found that the five testifying employees were "representative of all employees employed by [petitioner] during the relevant period" and that "further testimony would have been cumulative because it was clear all employees generally worked the same hours and were paid strictly on a piece-rate basis" (*ibid.*). In addition, the court rejected the testimony of petitioner's witnesses as "not credible," and found that petitioner's payroll records were "false and inaccurate" (*id.* at D3, D4).

Based on those credibility determinations, the district court found that all of petitioner's employees "regularly worked over 40 hours per week," including more than eight hours Monday through Friday and four to six hours on Saturdays (Pet. App. D5). Thus, petitioner failed to pay all 28 named employees for overtime at not less than one and one-half times their regular rate of pay, and failed to pay some employees the minimum wage of $3.35 per hour for all hours worked (*ibid.*). The court also adopted as "reasonable and correct" the back wage computations made for all 28 employees by the compliance officer,

which took into account the employer's regular pattern of business fluctuations (*id.* at D6).[1]

The district court thus concluded that petitioner violated the FLSA by falsifying payroll records and by failing to pay minimum wage and overtime compensation (Pet. App. D7). The court held that the Secretary had met her burden of showing, in the absence of accurate employer payroll records, that the "employees performed work for which they were not paid the compensation required under the Act and the extent of such work 'as a matter of just and reasonable inference' " (*ibid.*, quoting *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)). The court noted that, once testimony of representative employees establishes prima facie proof of a pattern or practice of FLSA violations, the burden shifts to the employer to rebut the existence of the violations or to prove that individual employees are excepted from the pattern or practice (Pet. App. D8). Here the court concluded that "[r]epresentative employee testimony established a pattern of violations" and that petitioner presented "no credible evidence to the contrary" (*ibid.*). Accordingly, the court enjoined petitioner from further violations of the Act and awarded back wages plus an equal amount of liquidated damages to all 28 named employees (*id.* at D9-D11).

3. The court of appeals affirmed. It held (Pet. App. A4-A5) that "the *Mt. Clemens Pottery* standard allows district courts to award back wages under the FLSA to non-testifying employees." Applying the burdens of proof set out in *Mt. Clemens Pottery*, 328 U.S. at 687, the court of appeals agreed with the district court that the testimony of the Secretary's five employee witnesses "established 'as

[1] Specifically, the district court found that the employees generally worked 40 hours per week for three months; 42½ hours per week for three months; 46 hours per week for three months; and 50 hours per week for three months (Pet. App. D6).

a matter of just and reasonable inference,' *id.*, that all of the employees regularly worked over eight hours on weekdays and over six hours on many Saturdays" (Pet. App. A5). Because that testimony "directly supports" the district court's finding that "all" petitioner's employees regularly worked more than 40 hours per week, the court of appeals held that the 23 nontestifying employees had also established a prima facie case that they had worked unreported hours (*ibid.*).

Next, the court of appeals held that petitioner had failed to meet its burden under *Mt. Clemens Pottery* to negate the reasonable inference from the testimony that all of petitioner's employees were similarly situated (Pet. App. A5). The court afforded "great deference" to the trial court's determination that petitioner's witnesses were not credible, and found that credibility determination "not clearly erroneous" (*id.* at A5-A6). As petitioner did not contest the district court's finding that its payroll records were false and inaccurate, there was no credible evidence to negate the "reasonable inferences" drawn from the Secretary's case (*id.* at A4, A6).

Finally, the court of appeals affirmed the district court's damages award, applying the *Mt. Clemens Pottery* standard that, if an employer fails to carry its burden of establishing the precise amount of work performed, damages are to be awarded "even though the result may be only approximate" (Pet. App. A6 (quoting *Mt. Clemens Pottery*, 328 U.S. at 688)). Noting that the district court had "considered the inconsistencies in the testimony of the Secretary's witnesses when it formulated the awards," the court concluded that the damages awarded were "properly based upon reasonable inferences from the employees' testimony" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, no further review is warranted.

1. In *Mt. Clemens Pottery,* this Court held that, if an employer has failed to keep proper records of wages and hours as required by law, an employee seeking to prove a violation of the FLSA need only "prove[ ] that he has in fact performed work for which he was improperly compensated" and "produce[ ] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference" (328 U.S. at 687). Thereafter, the burden shifts to the employer "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence" (*id.* at 687-688). If the employer fails to meet that burden, damages may be awarded "even though the result be only approximate" (*id.* at 688). That allocation of the burden of proof "proper[ly] and fair[ly]" avoids penalizing employees by "plac[ing] a premium on an employer's failure to keep proper records in conformity with his statutory duty" (*id.* at 687).[2]

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[2] Petitioner's contention that each employee must testify in order to establish the "fact of overtime work" (Pet. 9 (emphasis omitted)) is simply wrong. See, *e.g., Donovan* v. *Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985); *Donovan* v. *Simmons Petroleum Corp.*, 725 F.2d 83, 86 (10th Cir. 1983); *Donovan* v. *New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982); *Brennan* v. *General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973). Indeed, *Mt. Clemens* itself was a suit by a local union and seven of its members on behalf of some 300 similarly situated employees, only eight of whom testified at trial. See *Mt. Clemens Pottery Co.* v. *Anderson*, 149 F.2d 461, 462 (6th Cir. 1945), rev'd, 328 U.S. 680 (1946).

The award of back wages to 23 nontestifying employees in this case is fully consistent with the uniform application of *Mt. Clemens Pottery* to permit recovery of back wages on behalf of nontestifying employees, based on the representative testimony of other similarly situated employees.[3] As the Eleventh Circuit recently explained, "[t]he fact that several employees do not testify does not penalize their claim; it is clear that each employee need not testify in order to make out a prima facie case of the number of hours worked as a matter of just and reasonable inference." *Brock* v. *Norman's Country Market, Inc.*, 835 F.2d 823, 828 (1988) (internal quotation marks and citations omitted), cert. denied, No. 87-1593 (June 20, 1988). Instead, "[c]ourts have frequently granted back wages under the FLSA to non-testifying employees based upon the representative testimony of a small percentage of the employees," as long as that testimony is "fairly representational" of the larger group (*Donovan* v. *Bel-Loc Diner, Inc.*, 780 F.2d at 1116). "The Secretary is not required to present each employee as a witness"; and it is "inadequate" to compensate only employees who "chose or were chosen to testify" if other employees were also im-

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[3] *Donovan* v. *Bel-Loc Diner, Inc., supra* (testimony of 22 employees supports award to 98 employees); *Donovan* v. *Williams Oil Co.*, 717 F.2d 503 (10th Cir. 1983) (testimony of 19 employees supports award to 34 employees at nine separate service stations); *Castillo* v. *Givens*, 704 F.2d 181 (5th Cir.) (testimony of 13 employees supports award to 39), cert. denied, 464 U.S. 850 (1983); *Donovan* v. *New Floridian Hotel, Inc., supra* (testimony of 23 employees supports award to 207); *Brennan* v. *General Motors Acceptance Corp.*, 482 F.2d 825 (5th Cir. 1973) (testimony of 16 employees supports award to 27); *Marshall* v. *Brunner*, 500 F. Supp. 116 (W.D. Pa. 1980) (testimony of 48 employees supports award to 93), aff'd, 668 F.2d 748 (3d Cir. 1982).

properly paid. *Brock* v. *Tony & Susan Alamo Foundation*, 842 F.2d 1018, 1019-1020 (8th Cir. 1988).[4]

The obvious pragmatic basis for permitting reliance on such representative testimony is to avoid burdening the trial courts with unending parades of cumulative witnesses. See, *e.g.*, *Donovan* v. *Burger King Corp.*, 672 F.2d 221, 225 (1st Cir. 1982) (approving a significant limitation on the number of witnesses in an FLSA case as within the trial court's broad discretion under Fed. R. Evid. 403 to prevent the "needless presentation of cumulative evidence"). In this case, as in *Burger King*, the district court itself decided to hear only five employee witnesses called by the Secretary because further testimony would have been cumulative (Pet. App. D2-D3). The court of appeals, after reviewing the record, concluded that the testimony of these five employees "directly supports the district court's findings that all [petitioner's] employees regularly worked over forty hours per week" and established a prima facie case on behalf of the 23 nontestifying employees (Pet. App. A5). Since that prima facie case was not rebutted, all 28 named employees were awarded back wages.

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[4] None of the cases on which petitioner relies (Pet. 11) in any way undermines the general validity of representative testimony in FLSA cases. *Gilbert* v. *Old Ben Coal Co.*, 407 N.E.2d 170 (Ill. App. 1980), was not a pattern and practice case at all, but merely an unpersuasive claim by two individual plaintiffs. In *Marshall* v. *R & M Erectors*, 429 F. Supp. 771 (D. Del. 1977), the court actually awarded benefits to 12 identified, nontestifying employees based on testimony by 11 other employees, denying relief only to 11 unidentified employees as to whom there was virtually no record evidence. In *Brennan* v. *Parnham*, 366 F. Supp. 1014 (W.D. Pa. 1973), the court also awarded back wages to unidentified employees. Here, of course, the Secretary sought relief only for 28 employees specifically named in her complaint, whose periods of employment and wages were reflected on petitioner's payroll records (Pet. App. B6, D11).

Petitioner also complains that in this case there was "no reliable, admissible evidence of the *fact of damage*" to the 23 nontestifying employees, contending that the claim on their behalf was supported only by "insubstantial, bald hearsay" (Pet. 10). That argument is plainly wrong. The Secretary's five witnesses testified concerning the hours worked by themselves and their fellow workers based on personal knowledge and direct observation.[5] On appeal, petitioner did not challenge either the admissibility of that evidence or its reliability as to the hours worked by the testifying employees. Nor was that evidence "hearsay": the witnesses testified based on personal observation of their coworkers' presence in the garment factory, not by repeating their coworkers' out-of-court statements that they had worked overtime. See Fed. R. Evid. 801(c); E. Cleary, *McCormick on Evidence* § 246 (3d ed. 1984) (definitions of hearsay). The district court did not err by admitting and crediting the testimony of the Secretary's witnesses about their coworkers' hours.

2. Petitioner now asks this Court to "re-examine[ ]" *Mt. Clemens Pottery* by holding, contrary to the unanimous opinion of the courts of appeals, that it does not authorize recovery of back wages under the FLSA on behalf of nontestifying employees (Pet. 9). Instead, petitioner wants this Court to require, for the first time, that each employee on whose behalf an award of back wages is sought "testify briefly in open court," adding that "since the statute *directs* the Secretary to pay each employee his

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[5] The Secretary's witnesses not only testified as to their own hours of work, but also stated that their fellow employees worked the same hours that they did (Tr. 29, 78-79, 187, 366-367 (naming other employees who worked the same hours as testifying employees)). Cf. *Beliz* v. *McLeod & Sons Packing Co.*, 765 F.2d 1317, 1331 (5th Cir. 1985) (representative witnesses may testify based on personal knowledge of the work performed by their nontestifying coworkers).

share of the recovery, it seems ludicrous to allow any recovery for an employee whose whereabouts are unknown" (Pet. 14). *Mt. Clemens Pottery,* however, needs no reassessment; it has stood well the test of time and has been faithfully and sensibly applied by the lower courts. An employer who fails to keep accurate records as required by the FLSA " 'cannot be heard to complain' " if an award of damages lacks " 'precision of measurement.' " *Brock* v. *Seto,* 790 F.2d 1446, 1448 (9th Cir. 1986) (quoting *Mt. Clemens Pottery,* 328 U.S. at 688). An honest employer has nothing to fear from the rule that reasonable inferences about nontestifying workers' hours can be drawn from the testimony of other workers. Only because petitioner's records were "false and inaccurate" (Pet. App. D4) was it necessary to engage in any process of inference in order to reconstruct his employees' hours. Petitioner now seeks to benefit from the falsity and inaccuracy of his own records. As the *Mt. Clemens* Court held (328 U.S. at 687), no such benefit is due.[6]

---

[6] Moreover, the FLSA expressly authorizes awards of back wages that are unclaimed by employees after three years to revert to the Treasury of the United States (29 U.S.C. 216(c)). That rule, and the full disgorgement ordered against petitioner in this case, serve not only to ensure that an employer will lack the incentive to underpay employees in the hope that they cannot be found later, but also to "eliminate the competitive advantage enjoyed by goods produced under substandard conditions." *Citicorp Industrial Credit, Inc.* v. *Brock,* No. 86-88 (June 22, 1987), slip op. 8; see 29 U.S.C. 202(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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